No. 16,104

United States Court of Appeals

For the Ninth Circuit

States Marine Corporation of Delaware, a corporation, *Appellant,*

vs.

Victory Carriers, Inc., a corporation, and Shipowners & Merchants Towboat Co., Ltd., a corporation, Claimant of the Tug Sea Scout, *Appellees,*

and

Shipowners & Merchants Towboat Co., Ltd., *Appellant,*

vs.

Victory Carriers, Inc., a corporation, *Appellee.*

BRIEF FOR APPELLEE SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD.

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BRIEF FOR APPELLEE SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD.

JURISDICTION.

Appellee Shipowners & Merchants Towboat Co., Ltd. (hereinafter called "Shipowners & Merchants") approves the statement of jurisdiction presented by appellant States Marine Corporation of Delaware (hereinafter called "States Marine".)

STATEMENT OF THE CASE.

Shipowners & Merchants does not controvert the statement of facts set forth on pages 3 to 7 of States Marine's brief. Its statement of the issues, however, (pp. 8 and 9) is misleading and must be clarified:

1. Contrary to States Marine's statement (p. 8), there is no issue in this case of whether it or any charterer "can be subjected to liability for collision damage." States Marine was neither sued nor held liable for collision damage. Its liability arises from an express contract warranting its authority to act and agreeing to furnish indemnity for all loss and expense resulting from a breach of that warranty. The issues on this appeal concern that contract—its existence, validity and effect, together with the issue of whether or not the warranty was breached.

2. The District Court found (Finding V, Tr. 41) that States Marine was bound by the 1956 form of pilotage clause. The issue here is not whether Shipowners & Merchants has "carried its burden of proving" that contract (States Marine's brief, p. 8) but whether Judge Goodman's finding to that effect was clearly erroneous. *McAllister v. United States,* 348 U.S. 19, 99 L. ed. 20 (1954.)

This appellee agrees with States Marine's statement of the legal issues designated as points (2) (a) and (b) on page 9 of its brief.

ARGUMENT.

Shipowners & Merchants has for years operated under a "pilotage clause" by which its tug masters are deemed the servants of the shipowners whose vessels they pilot during docking and undocking maneuvers. Such clauses are used by other tug companies in other ports, and have been applied repeatedly in cases arising before and since their validity was finally upheld in *Sun Oil Co. v. Dalzell Towing Co.,* 287 U.S. 291, 77 L. ed. 311 (1932). The effect, when the shipowner has agreed to the clause, is to prevent his recovering from the tug company for damage to the vessel caused by the pilot's fault.

When the shipowner is not a party to the contract, however, as in a case where the tug and pilot service is requested by a charterer, it has been held that the pilotage clause in its traditional form does not protect the tug company. Thus, in *The Jules Fribourg,* 140 F. Supp. 333 (N.D.Cal. 1956), which involved the same tug company and the same charterer as are here on this appeal, it was held that States Marine was not authorized to bind the owner to the clause, and that no warranty of such authority could be implied from the circumstances of the case. The result was that the owner recovered his hull damage from Shipowners & Merchants, while States Marine escaped liability.

Within six weeks of the *Fribourg* decision, Shipowners & Merchants circularized among its customers an amended pilotage clause, including as the major modification a new paragraph by which charterers and other non-owners expressly warranted their authority to bind owners to the clause and expressly agreed to indemnify Shipowners & Merchants against loss, damage or expense suffered in

consequence of a breach of that warranty. The new clause, obviously designed to protect Shipowners & Merchants in any future *Fribourg* situation, was received without protest by States Marine, which thereafter continued to use the services of Shipowners & Merchants. Seven and one-half months later the collision occurred which gave rise to this case. Victory Carriers sued Shipowners & Merchants, who impleaded States Marine under the pilotage clause.

After following the *Fribourg* decision and allowing the owner to recover from Shipowners & Merchants, Judge Goodman recognized the clear intent of the new clause and, finding as a fact that it had been communicated to and accepted by States Marine as part of the contract, rendered a decree for indemnity in accordance with its terms. The collision had resulted from mutual faults by the pilot and the tug. Had States Marine been authorized to bind Victory Carriers to the clause, the effect would have been to impute the pilot's negligence to the latter, thus reducing its recovery to half damages under the usual rule of mutual fault collisions. Accordingly, Judge Goodman found that States Marine's breach had damaged Shipowners & Merchants to the extent of one-half the total damages, and awarded indemnity to cover that sum.

On this appeal, States Marine takes issue with virtually all aspects of the decision below except the finding of mutual fault. Its main attack, to which the first and major portion of its brief is devoted, is upon the District Court's finding that Victory Carriers was not bound by the pilotage clause and was entitled to recover from Shipowners & Merchants for damage caused by pilot error.

For the reasons expressed in its opening brief as appellant, Shipowners & Merchants takes no position on that issue and will not reply to the argument thereon.

States Marine's argument against the indemnity decree, which it concedes to be of secondary importance, appears at pages 33 to 42 of its brief. It consists of a casual attempt to upset a finding of fact, vague insinuations of "monopoly," implications of doubt as to the validity of the pilotage clause, and an attempt to cloud the issues by reference to stevedore cases having nothing to do with either pilotage or collision law. Such tactics cannot obscure but rather serve to emphasize the desperate position in which States Marine finds itself, faced with:

1. the necessity of upsetting a finding after failing to produce the only witnesses whose testimony could possibly have supported a contrary finding,

2. the Supreme Court's approval of the pilotage clause, first expressed in 1932 and reaffirmed in 1955, and

3. a complete lack of pilotage or collision cases supporting its theories of why Shipowners & Merchants should be denied the protection of the clause in this case.

I.

THE FINDING THAT STATES MARINE ACCEPTED AND BECAME BOUND BY THE 1956 PILOTAGE CLAUSE WAS NOT CLEARLY ERRONEOUS.

Leo J. Collar, of the office staff of Shipowners & Merchants, testified (Tr. 60-64) that on May 4, 1956, he sent two copies of a letter (Respondent's Ex. C) together with several copies of a printed form of schedule or tariff

(Respondent's Ex. D) to two named individuals of States Marine, and that States Marine continued to hire Shipowners & Merchants tugs frequently thereafter during the eight months up to the date of the accident, without answering the communication of May 4, 1956. Proctor for States Marine did not cross-examine Collar as to such testimony, and produced no evidence to controvert it. In view of such clear proof of receipt and failure to protest, it may be fairly assumed that States Marine acquiesced in the terms set forth in the letter and enclosures of May 4, 1956, which clearly embodied the indemnity agreement here in issue.

The following authorities support this assumption:

The Margaret A. Moran, 57 F.2d 143 (2 Cir. 1932):

"This towing schedule, containing the pilotage clause, sufficiently apprised the appellee that the service was to be rendered on these terms. No other terms having been suggested by the appellee, we must assume that they accepted the terms contained in the schedule." (p. 144.)

Graves v. Davis, 1923 A.M.C. 490, 235 N.Y. 315, 139 N.E. 280 (N.Y.Ct.App.):

"When the defendant gave notice on what terms it would furnish tug service, the charterer actually accepted such terms and entered into a special contract incorporating them when it ordered tow service without protest." (1923 A.M.C. at p. 492.)

Hand & Johnson Tug Line v. Canada S.S. Lines, 281 Fed. 779 (6 Cir. 1922):

"Nor is any express assent by the appellee necessary to make a binding contract. If the tariff had

been received, appellant had a right to assume that a request for towing was pursuant to the offer which had been made, and hence upon all conditions stated, and appellee may not deny that the conditions attached." (p. 783.)

For all practical purposes, the sufficiency of the transmission of the contract terms, and the acquiescence thereto, has been admitted in the following colloquy between the trial court and proctor for States Marine, (Tr. 84):

"The Court. Well, I think I would have to hold, from the state of the record, that this particular provision was called to the attention of your client as being a condition under which the pilots were being furnished. I mean, there is no contrary testimony, nothing to indicate it otherwise.

Mr. Tetreault. No; we concede we received the letter."

States Marine sought in the trial court, and seeks again here, to qualify this admission and to cloud the proof of a specific contract condition by reference to older forms of the pilotage clause printed on billheads or letterheads passing between the parties. This is merely an attempt to create an illusion, unsupported by proof, that officers of States Marine were misled into assuming that services were to be provided under the older clause rather than the newer form specifically called to their attention by the letter and enclosures of May 4, 1956. (Respondent's Ex. C and Ex. D.)

If these people were confused or misled, why didn't they come forward and say so? Not a single witness was

produced by States Marine to say that he thought he was operating under the older clause, or that he didn't know which clause applied. It has been proved and admitted that the new clause was properly called to the attention of States Marine as a condition under which pilots were furnished, and, in the words of Judge Goodman, there is no contrary testimony.

The reason for such reticence is obvious. The decision in *The Jules Fribourg,* 140 F. Supp. 333, in which States Marine faced the problem of possible indemnity obligation for pilot error, was handed down March 29, 1956. Only a few weeks later, on May 4, 1956, a new form of tariff and a specific letter were sent to Mr. de la Pena and to Captain Griffith of States Marine (Collar; Tr. 60) containing the text of a new pilotage clause which was patently designed to avoid the type of liability imposed upon the tug owner by the *Fribourg* decision. Mr. de la Pena and Captain Griffith must have been keenly aware of the issues raised by the new clause. It is inconceivable that they could testify under oath that they did not understand the new clause, or had not read it, or were misled by some other clause appearing on a billhead. For this reason, they did not appear at all, and their eloquent silence, coupled with Collar's testimony, amply supports the finding of the trial court that States Marine accepted and became bound by the 1956 pilotage clause. As Judge Goodman said, in answer to States Marine's argument based on the use of the old bill forms and letterheads:

> "I don't think very much of the logic of that argument. I don't blame you for making it, but we have to use our common sense, of course, in apprais-

> ing the conduct of the parties. It is very obvious this is the clause by virtue of the decision that had been rendered in the Fribourg case, and both parties having been involved in it, this was the clause they now wanted to use and the fact that they used some old documents in which to convey that information doesn't seem to me to be a reasonable basis of construction what the parties intended to do." (Tr. 88.)

The "monopoly position" of Shipowners & Merchants, to which States Marine makes casual reference in its brief (pp. 9, 37) is not established by the record. With a pilotage clause, as with any contract, the burden of establishing that it is against public policy is upon the party who asserts that fact. *National Distillers Prod. Corp. v. Boston Tow Boat Co.,* 134 F. Supp. 194 (D.Mass. 1955). Yet States Marine called no witnesses, and bases its monopoly argument entirely on the testimony of Mr. Collar. (Tr. 70-71.) That reliance is mystifying, as Mr. Collar made repeated reference to other tug companies and other pilots, and to their use by States Marine.

Also unwarranted is the implication in States Marine's brief (pp. 36-37) that the Supreme Court, in the 1955 towage cases (*Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 99 L. ed. 911; *Boston Metals Co. v. S.S. Winding Gulf,* 349 U.S. 122, 99 L. ed. 933; *United States v. Nielson,* 349 U.S. 129, 99 L. ed. 939) has weakened or qualified its 1932 decision upholding the validity of the pilotage clause in a docking or undocking situation. (*Sun Oil Co. v. Dalzell Towing Co.,* 287 U.S. 291, 77 L. ed. 311.) In fact the Court reaffirmed its earlier holding in the course of the *Bisso* opinion:

"It is one thing to permit a company to exempt itself from liability for the negligence of a licensed pilot navigating another company's vessel on that vessel's own power. That was the Sun Oil Case. It is quite a different thing, however, to permit a towing company to exempt itself by contract from all liability for its own employees' negligent towage of a vessel. Thus, holding the pilotage contract valid in the Sun Oil Case in no way conflicts with the rule against permitting towers by contract wholly to escape liability for their own negligent towing." (349 U.S. at p. 94, 99 L. ed. at p. 919.)

II.

HAD VICTORY CARRIERS BEEN BOUND BY THE PILOTAGE CLAUSE IT WOULD HAVE BEEN RESTRICTED TO A RECOVERY OF HALF DAMAGES.

In a mutual fault collision each vessel recovers one-half her damages from the other. *The North Star,* 106 U.S. 17, 27 L. ed. 91 (1882). Had the pilotage clause been brought home to Victory Carriers, the effect would have been to impute the pilot's fault to the Emery and her owners, and to require an adjustment of the collision claim on a mutual fault basis.

It is important to bear in mind that we are dealing here with a case of damage *to the assisted vessel,* not to a tug or a third vessel. The effect of a pilotage clause on the owner's right to recover in such a case has never been doubted since *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 77 L. ed. 311 (1932). That decision gives full effect to the language of the clause insofar as it makes the pilot the servant of the vessel owner and thereby prevents the

latter from recovering damages based on pilot error. To the same effect are

The Margaret A. Moran, 57 F. 2d 143 (2 Cir. 1932);
National Distillers Prod. Corp. v. Boston Tow Boat Co., 134 F. Supp. 194 (D. Mass. 1955);
Hagood, 1925 A.M.C. 1646 (S.D.N.Y. 1925).

If the damage results solely from pilot error, as in the above cases, there can be no recovery from the towing company. If the damage results from mutual faults by the pilot and the tug, as in the case at bar, the only logical result is to reduce the owner's recovery to one-half, since that would be the result were his own employees in charge of the ship:

Great Lakes Towing Co. v. American S.S. Co., 165 F. 2d 368 (6 Cir. 1948);
The Teaser, 246 Fed. 219 (3 Cir. 1917);
U. S. v. Holland, 151 F. Supp. 772 (D. Md. 1957);
North Sea-Texas, 1928 A.M.C. 758 (W.D.N.Y. 1927);
The Adriatic, 183 Fed. 867 (E.D.Pa. 1910).

The effect of the clause is not to "absolve" the pilot of negligence, as stated by States Marine? (p. 40.) His negligence remains in the case, but the ultimate responsibility therefor, as between parties to the clause, is shifted to the owner to the extent specified in the contract.

United States v. Nielson, 349 U.S. 129, 99 L. ed. 939 (1955) is in no way contrary to the above rule. The Supreme Court there denied the tug company the right to recover for damage *to its own tug,* caused by pilot error, simply because the contractual language was not broad enough to grant such a right. (See the analysis of this holding in *City of Long Beach v. American President*

Lines, 223 F. 2d 853, 858 (9 Cir. 1955).) The *Nielson* decision, being purely factual, can hardly control the present case which involves a different form of pilotage clause and a claim *by* the shipowner instead of *against* it. Here, the clause expressly provides that the vessel and her owners "will assume all liability" for damage caused by pilot error and that the tug owner bears no responsibility therefor. Clearer language is difficult to imagine, and it is worthy of note that no claim is made by States Marine that the result below is not in accord with the wording of the contract.

The Chattahoochee, 173 U.S. 540, 43 L. ed. 901 (1899), cited by States Marine at page 40 of its brief, held that innocent owners of cargo lost in a mutual fault collision could recover damages in full from the colliding vessel, even though they were prevented by statute from proceeding against the carrying ship. The rule is consistent with the ordinary obligations of a joint tort feasor to an innocent third party. Its relevance to the present case is lacking, however, as the key to the *Chattahoochee* result is the complete freedom from fault, imputed or otherwise, on the part of the cargo claimants. Victory Carriers could not claim such innocence had it been bound by the pilotage clause, for it would thereby have agreed to assume all liability for pilot negligence.

The interjection of the stevedore indemnity cases (*Weyerhaeuser, Ryan, Mowinckels* and *Crumady*) at page 41 of States Marine's brief is likewise irrelevant and serves merely to cloud the real issues. Those cases hold that a stevedore, whose negligence has created a dangerous condition causing personal injuries for which a vessel

owner is held liable, is obligated to indemnify the owner under an express or implied warranty of workmanlike service in the stevedoring contract. Without citation of authority, States Marine seeks to extend the stevedore rule to cover this collision case. In so doing, it conveniently ignores the multitude of cases, such as those cited at page 11 above, giving tug companies the benefit of the divided damage rule in mutual fault situations. Adoption of the rule for which States Marine contends would require the overruling or disapproval of all such cases, since each involved an agreement for towage or assisting service, affording the same basis for an implied warranty as exists in the case at bar. There are compelling distinctions between the stevedore cases and the present collision case which prevent the application of the indemnity theory:

1. The stevedore indemnity cases all involve suits *on the contract,* not in tort. That approach was found necessary to avoid the rule of *Halcyon Lines v. Haenn Ship C. & R. Corp.,* 342 U.S. 282, 96 L. ed. 318 (1952) wherein the Supreme Court held that an action for contribution from the negligent stevedore on a tort theory would not lie. By no stretch of imagination can the libel herein (Tr. 3) be described as sounding in contract. No mention is made of any agreement or warranty by Shipowners & Merchants. Victory Carriers' cause of action was pleaded and proved purely in tort, as it had to be. (See *Stevens v. The White City,* 285 U.S. 195, 76 L. ed. 699 (1932).) The distinction is critical. In the *Ryan* case the Supreme Court emphasized that the stevedore's obligation is determined by "the precise ground of the ship-

owner's action." Pointing out that the action was on the agreement, the Court said that "consequently, the considerations which led to the decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282, 96 L. ed. 318, 72 S. Ct. 277, are not applicable." (*Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124, 132-133, 100 L. ed. 133, 141 (1956).)

2. All of the stevedore cases cited by States Marine are *non-collision* cases. The indemnity rule is relatively new, and developed, as explained above, from the decision in the *Halcyon* case refusing to extend the divided damage rule to a non-collision case. It is clear from the *Halcyon* opinion, however, that the collision rule is to be unchanged: "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each. . . . This maritime rule is of ancient origin and has been applied in many cases. . . ." (*Halcyon Lines v. Haenn Ship C. & R. Corp.,* 342 U.S. 282, 284, 96 L. ed. 318, 319 (1952).) States Marine cites no authority to indicate that Victory Carriers would have been able to avoid this time-honored rule had it been bound by the pilotage clause.

3. Were Victory Carriers bound by the clause, its assumption of liability for the pilot's fault would bar any claim for full recovery from Shipowners & Merchants even if the stevedore cases were applicable. States Marine's argument assumes an *implied* promise of indemnity by the tug company. It is settled that the shipowner has no cause of action for implied indemnity in a

joint fault case. *Amerocean Steamship Company v. Copp,* 245 F. 2d 291 (9 Cir. 1957).

4. In *Ryan* and the other stevedore cases it was permissible for the courts to find implied indemnity agreements benefiting the shipowners since the actual contracts did not purport to cover the point one way or the other. Assuming the pilotage clause to be binding on Victory Carriers, the situation would not be at all parallel. In that event the implication of an indemnity obligation on the part of Shipowners & Merchants would not only be unwarranted by the contract, but would be contrary to its express terms, since under the clause the shipowner expressly assumes liability for pilot error and agrees to indemnify the tug company.

III.

THE TUG'S FAULT DOES NOT BAR SHIPOWNERS & MERCHANTS FROM ENFORCING THE EXPRESS INDEMNITY OBLIGATION OF STATES MARINE UNDER THE PILOTAGE CLAUSE.

States Marine expressly warranted its authority to bind Victory Carriers to the pilotage clause and expressly agreed to indemnify Shipowners & Merchants against all loss, damage and/or expense suffered or incurred in consequence of its lack of such authority. (Finding V, Tr. 41-43.) In consequence of States Marine's breach of the foregoing warranty (Finding VII, Tr. 43) Shipowners & Merchants was damaged to the extent of one-half the amount of its liability to Victory Carriers (Finding XIII,

Tr. 45). Applying the clear terms of the indemnity agreement, the District Court held States Marine liable over to Shipowners & Merchants for such one-half. (Finding XIII, Tr. 45; Conclusion III, Tr. 46; Interlocutory Decree, Tr. 47.)

States Marine now claims (Brief, p. 41) that the independent negligence of the tug somehow provides a defense by which States Marine can escape the express obligations it assumed in the contract. Once again its argument is based entirely on a non-collision stevedore case (*Amerocean Steamship Company v. Copp,* 245 F. 2d 291) which is readily distinguishable:

1. The discussion in the *Copp* opinion makes it clear that this Court was there dealing with an *implied* indemnity obligation such as was held to exist in the *Ryan* case. Since the accident resulted from active and concurrent negligence by both the shipowner and stevedore, the case was governed by the *Halcyon* decision and held that no implied indemnity obligation existed. Even in the stevedore cases (assuming they had any relevance here) the situation is far different when an *express* indemnity agreement is involved. In such a case the stevedore is held to his indemnity obligation regardless of the shipowner's fault. *A/S J. Ludwig Mowinckels R. v. Commercial Steve. Co.,* 256 F. 2d 227 (2 Cir. 1958).

2. The *Copp* decision itself expressly limits its application to *non-collision* cases. It follows *Halcyon* by denying recovery over in a joint fault situation, in accordance with well established common law and admiralty doctrine, but points out that "an apparent exception is division of damage in ship collision cases." (245 F. 2d at p. 294.)

3. The *Copp* libelant was seeking *complete* indemnity for a loss to which his own negligence had contributed. Relief was denied since it would have allowed him to take advantage of his own fault. (See 245 F. 2d at p. 294.) The situation is different here. Shipowners & Merchants does not seek to avoid its rightful liability based on the fault of the tug, a liability which is equal to one half the total damages. It merely seeks indemnification to cover the remaining half, for which its liability exists solely by virtue of States Marine's breach of warranty. States Marine offers neither argument nor authority that such apportionment of the ultimate liability is at all inequitable. In fact, the partial indemnity sought by Shipowners & Merchants is nothing new, but has been granted before in a pilotage clause situation. In *Gypsum Queen-Peerless,* 1953 A.M.C. 2071 (E.D. Va. 1953), a ship collided with the pier due to faults by the tug and the docking pilot. The tug company was liable in full to the owner of the pier (on whom the pilotage clause was not binding) but recovered one-half from the shipowner as indemnity under the clause. The basis for indemnity is even clearer in the present case, since the 1956 pilotage clause includes an *express* indemnity agreement which was not present in the *Gypsum Queen* clause.

CONCLUSION.

The decree against States Marine followed a factual finding, based upon substantial evidence, that the services of the pilot were ordered pursuant to the 1956 pilotage clause. That clause is not ambiguous. It clearly defines the responsibilities of a charterer, which previously had been trusted to implication. Federal courts, including the Supreme Court, have consistently recognized the freedom of parties contracting for pilot service to agree beforehand on the distribution of contingent liabilities inherent in a docking or undocking situation. The decree below, in applying the pilotage clause as written, is but another recognition of that freedom of contract, and is consistent with prior authority. It should be affirmed.

Dated, San Francisco, California,
June 15, 1959.

Respectfully submitted,
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